Public Control of...

Privately-Owned Land

Approaching Land Use from the Legal Perspective

A Report by the
All-University Council on Environmental Quality

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PUBLIC CONTROL OF PRIVATELY-OWNED LAND:

Approaching Land Use from the Legal Perspective

a report by the

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FOREWORD

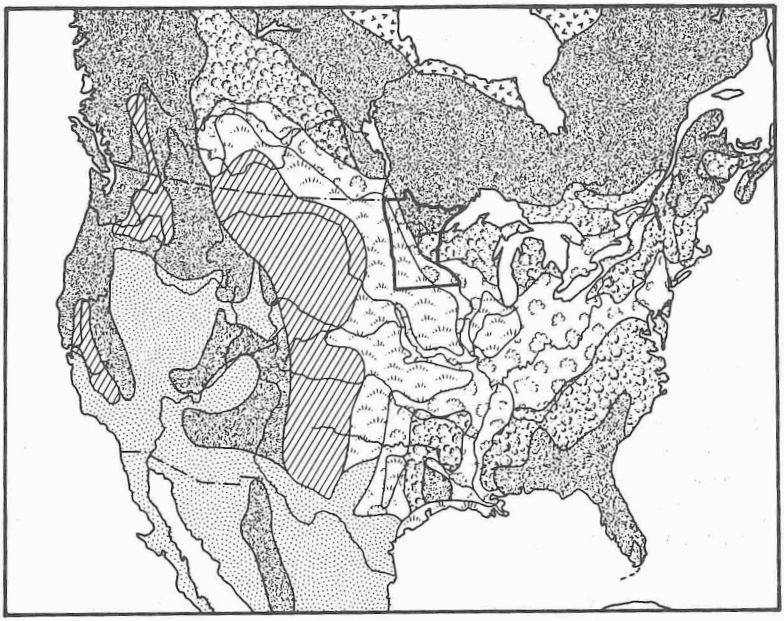
Many environmental and social problems involve questions of land use. As an area of social policy, land use poses a fundamental dilemma. This dilemma is defined when the private landowner says "I will decide how I will use land which I own," and his neighbor, or his community, or some broader social goal (the "public interest") replies "You can use the land you own in any way you desire, so long as you do not harm me." There is no doubt that the application of rational planning and reasonable regulations can remedy or forestall most of the abuses resulting from traditions which exalt the autonomy of the private landowner as concerns his land. Neither is there any doubt that such planning and regulations constrict individual free choice and are consequently regarded by many landowners as intrusions upon fundamental rights.

One of the functions of the law is to define such dilemmas by determining in individual cases, when conflict exists, which side will prevail and why. Over time, a method evolves for recognizing and balancing the relevant competing interests. The article by Alan Freeman describes the historical development of public restrictions on the use of private land. Whether or not one is interested in the legalities of land use questions, this article serves as a valuable background piece by identifying the significant individual and social interests involved. The Appendices outline some recent expansions of the power of Minnesota to control private land use, and include a short glossary of land use terms and a list of suggested readings.

In May 1975, the All-University Council on Environmental Quality invited a number of representatives from citizen's groups and State agencies to a meeting at which problems of concern to these groups and agencies were discussed. One of the suggestions made at the meeting was that the Council could perform a useful service by preparing a series of short reports dealing with current environmental issues in Minnesota. The general issue of land use control was of concern to virtually all of the individuals present at that meeting. This report is the first of the series. The report was prepared by Steven Emmings - a staff member of the Council and a law student at the University of Minnesota. It was discovered that Alan D. Freeman, Professor of Law at the University of Minnesota, had recently completed a paper dealing with land use controls. He has graciously permitted us to include his paper in this report.

Dean E. Abrahamson
Chairman, All-University Council on
Environmental Quality

NATURAL VEGETATION



From John R. Borchert and Donald P. Yaeger, Atlas of Minnesota Resources and Settlement (Minnesota State Planning Agency, 1969) p.3.

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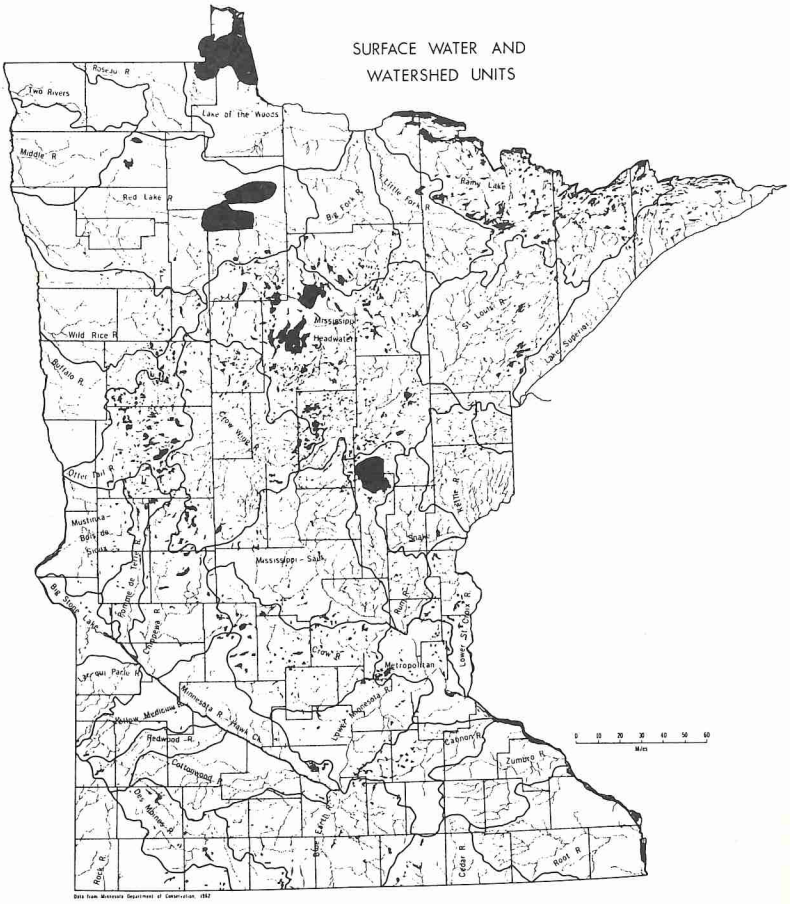
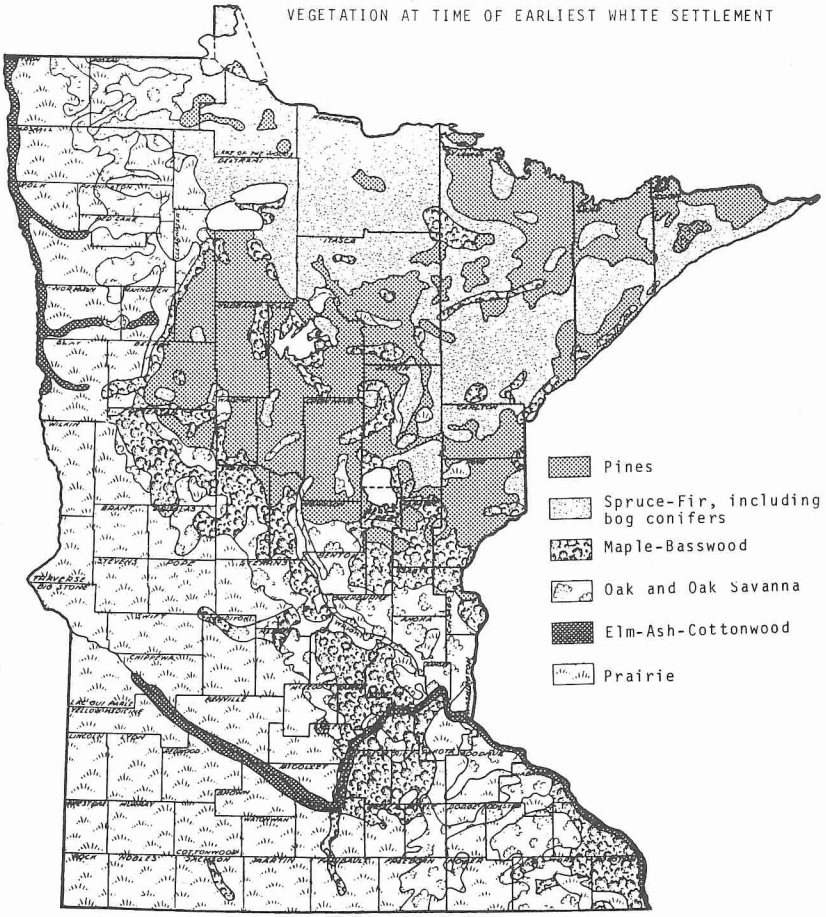


From John R. Borchert and Donald P. Yaeger, Atlas of Minnesota Resources and Settlement (Minnesota State Planning Agency, 1969) p.24.

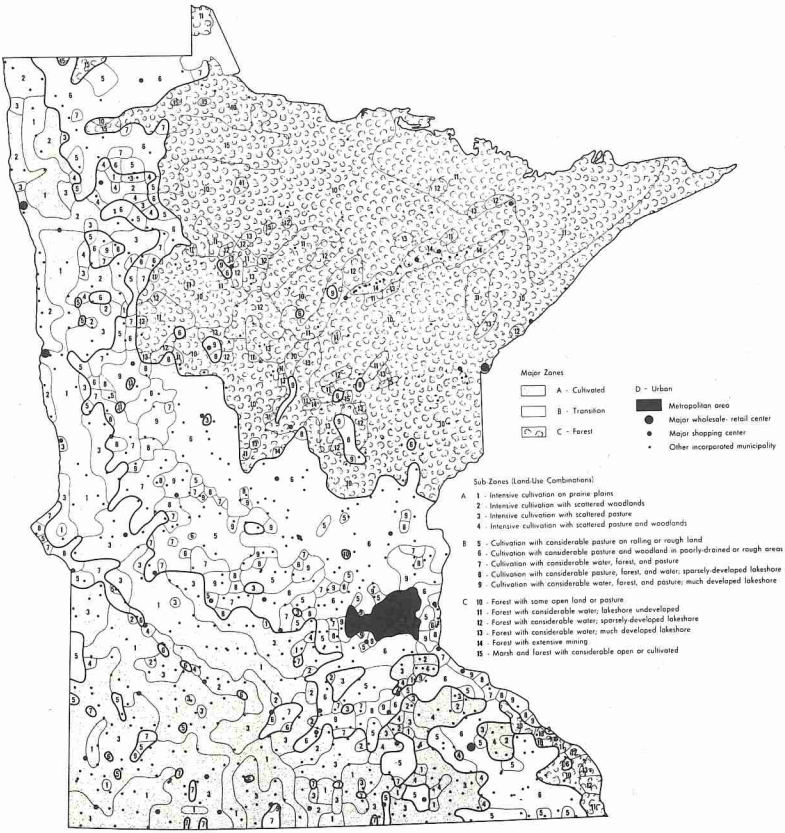
I. INTRODUCTION

There is a "natural" use of the land; that is, ignoring the presence of man and the impact of his decisions, there is a condition of the earth's surface which could be described as "natural". This natural condition may be described at any point in time but it is, of course, an evolving system. For example, lakes undergo a natural aging process from lake to marsh to dry land; and features which once dominated Minnesota's landscape such as glaciers, fresh water seas, and even a mountain range, are now gone. Superficially, this natural condition of the land can be characterized by describing the pattern of vegetation (non-agricultural) and the distribution of surface water.

VEGETATION AT TIME OF EARLIEST WHITE SETTLEMENT



Land ownership is an arbitrary system which results in the land surface being divided into parcels and even in the division of the surface from its underlying minerals (only in recent years has it been required that severed mineral rights be registered in Minnesota). Land use then becomes a function of the landowner's decisions; it is the natural condition of the land as modified by the landowner's desires and needs. For example, marshes may be drained and the land converted to agricultural purposes; the land may be covered by buildings, cities, highways, or reservoirs; land might be "preserved" to some degree (left to the forces which cause the evolution of natural land condition); channels of rivers and streams can be altered or dammed; and the surface of the land can be removed to reach underlying minerals.



There are, however, a variety of restrictions on the freedom of landowner choices about land use. Approximately twenty percent of Minnesota's land is owned by federal, state, or county governments. Land use decisions for this publicly owned land are made by public bodies and are little affected by private individuals. Public control of private land use is an active and sometimes controversial area of social and legal policy. The use of land which is privately owned is subject to restrictions imposed by nuisance law, building codes, pollution and health regulations, taxation, and zoning regulations.

When a public body decides to control private land use, it has essentially two routes which it might follow: purchase of the land or regulation of its use. Purchasing the land outright, either through negotiation or the power of eminent domain (condemnation proceedings), is very expensive and frequently unnecessary to achieve the regulatory goal. A less expensive alternative is the purchase of an easement (the purchase of just as much of the landowner's development rights as is necessary to attain the regulatory goal). Regulations (no compensation to the landowner) can forbid certain uses or require conformance with established standards. The power to regulate the use of privately owned land may only be exercised when authorized by law. If a regulation restricts the landowner's freedom of choice "too much," it will violate federal and state constitutional prohibitions against the taking of private land for public purposes without compensation.[1]

Zoning regulations, a common and growing form of public control of private land use, originated and developed in an urban setting. In recent years, environmental concerns and the expansion of the "planning" function of government have pushed this type of regulation into outlying areas. It is foreseeable that all of Minnesota's land will one day be zoned and subject to controls as to use. The statute which declares Minnesota's environmental policy contains the following language:

> In order to carry out the policy set forth [in this section] ...it is the continuing responsibility of the state government to use all practicable means, consistent with other considerations of state policy, to coordinate state plans, functions, programs, and resources to the end that the state may:
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> ...

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[1] Constitution of the State of Minnesota, Article I, section 13: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

> (f) Develop and implement land use and environmental policies, plans and standards for the state as a whole and for major regions thereof through a coordinated program of planning and land use control;... (Minnesota Statutes 1974, section 116D.02, subdivision 2)

At present municipalities, counties, regional development commissions, states, multi-state commissions, and the federal government all play a role in land use planning and decision making. There is a controversy over whether these decisions should be in the hands of local governments which are presumably more responsive to local needs and desires, or in the hands of larger units of government which presumably act in the broader interest of the state or the country.

II. HISTORICAL DEVELOPMENT OF PUBLIC RESTRICTIONS ON THE USE OF PRIVATE LAND

by Alan D. Freeman
Professor of Law, University of Minnesota

Most people who buy land in the United States buy it with a view toward exploiting it for commercial, industrial, agricultural, residential, or other use. Both tradition and popular expectation support the idea that one is entitled to realize the maximum economic potential from one's tract of land in accordance with a personal choice as to mode of use. It is this basic expectation of exploitation that is being re-thought by courts and by state and local legislative bodies around the country today. A combination of economic concerns, environmental concerns, and population pressures has produced a bewildering array of novel and often highly restrictive regulations of land use. You may be told that your land is a valuable public resource that should not be developed at all, but simply left in its natural state. You may be told that you will not receive permission to develop your land until some future date when the community can afford to provide you with essential services, such as sewers or roads, or you may be told that you have purchased land in an area whose priority for development is low, and that you will not be permitted to develop until other, high priority, areas have been exhausted.

While these recent developments seem restrictive and contrary to many assumptions about the meaning of private land ownership, it is clear that American law has never recognized a complete freedom to do with your land whatever you want to do. A basic obstacle to such complete freedom, one that inevitably leads to restrictions, is that what you do with your land is likely to have an impact on what other people may do with their land, or on the community as a whole. If you build a house on your land, you can retain residential peace and quiet only by forcing all of your neighbors to use their land in a similar fashion, even if your neighbors would prefer to build stores or factories on their property. On the other hand, if you build a store or factory, you are forcing your neighbors to use their land in a similar fashion, or at least in some way that will not be offended by your noises, odors, or other discomforts. The aggregate of all of these impacts of one's land use on other land may be referred to as the spillover effects of land use. Restrictions on private land use are designated to regulate or limit spillover effects in a manner that maximizes land use benefits for the community as a whole in accordance with acceptable

ethical principles. The absence of any such regulation would likely lead to chaos, or to settlements of disputes by force.

There is then a basic tension between the notion of private land ownership and development and the spillover effects produced by private choices of land use. The history of public regulation of private land is a history of the evolving ground rules for resolution of that tension. Before proceeding with a discussion of that background, it seems useful to point up a distinction between two important categories of spillover effects. Some kinds of spillover effects give rise to issues as to where the activities that produce them should be located. Most people agree that we should have shopping centers, factories, gas stations, and apartment houses located somewhere in the community, but few people want these facilities next door to their farms or residences. The spillover effects produced by these activities are localized; the debate is over location. These localized spillovers are a primary subject for land-use regulation, and will serve as the basic model for my discussion. Another kind of spillover effect might be termed the pervasive one, the activity that the community regards as inappropriate anywhere. Regulations that set absolute ceilings on smoke emission, or water pollution, or noise production are of this type. And there are many regulations that refuse to fall neatly into either category, which may contain elements of each. In terms of regulation of land use, the pervasive spillover effect is the one that is most likely to present a serious danger to the health or welfare of the community as a whole, and for that reason may be a more acceptable candidate for severe restriction. The debate with respect to these kinds of restrictions tends to be over whether there is or is not a serious danger presented, as in the Reserve Mining case, rather than a debate over whether it is legitimate to engage in an activity that endangers the health of the entire community. The primary subject of my paper will be the regulations that are directed at accepted legitimate activities, where the effect of the regulation is not to ban the activity altogether, but to tell you that it must be done somewhere else, or at some other time.

In order to understand the current legal framework for assessing the validity of governmental restrictions on the localized spillover effects of land use, it is necessary first to explore the legal predecessor of those governmental restrictions, the law of private nuisances. Prior to the 20th century, the primary recourse, under Anglo-American law, for an aggrieved landowner complaining about his neighbor's activities, was for him to go to court and charge that his neighbor was a nuisance. As early

as 1306 there is a case where a neighbor went into court and complained that his neighbor had planted a grove of trees producing so much shade that the corn of the complaining neighbor could not ripen. Unfortunately, there is no record available of the disposition of the case, but the fact that such a case was brought shows the long history of the kinds of disputes I am talking about. If you succeeded in winning a nuisance case, you might receive a court order requiring your neighbor to cease the noxious activity altogether, or an order to change the conduct of the activity to the point where its noxious impacts were reduced, or at least a judgment for money damages as compensation for the injuries inflicted on you.

The basic problem for courts in nuisance cases was defining those activities that were to be legally regarded as nuisances, which, since we are talking about activitities that may be appropriate somewhere in the community, meant that courts had to decide which of the conflicting land uses was inappropriate in a given place. The basic legal rule from which this area of law has evolved is the ancient maxim, "Sic Utere Tuo Ut Alienum Non Laedas," which, roughly translated, means "So use your land as not to injure that of your neighbor," which is little more than a land-use version of the Golden Rule. The basic question was how to find an acceptable principle for determining whether the factory should stay and the homeowner should go, or the factory should go and the homeowner should stay. A number of approaches have been tried, none of which has really proved successful.

One approach is to decide that some kinds of land uses are inherently more deserving of protection than others. A number of courts in the United States, especially in the 19th century, tried this approach by taking the position that residential use of land is the highest form of use, and that any activity that conflicts with residential use must go. A typical judicial expression of this doctrine, one from an early 20th century case, is the statement that "the rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary or natural right." Under this doctrine, then, any conflict between a resident and any other kind of land use would be resolved in favor of the resident. Two examples may illustrate why this approach was unsuccessful. Suppose a person voluntarily buys a house that is in an industrial or agricultural area, and then complains about the smoke from the industries, or the odor of the farm animals. Under the approach that always favors the resident, the homeowner who invaded the established area could restrict or terminate the earlier activities,

regardless of economic impact or any notion of fairness to the established activities. Although some early cases, such as one where a person constructed a home next door to an existing brickyard, granted relief to the resident, later cases declined to relieve the homeowner who knowingly purchased in an area other than residential, such as next door to an airport, or in an agricultural area, or in an industrial urban area. In fact, by the mid-twentieth century you can find judicial opinions that have reworded the doctrine about residence being superior to trade to the point where it reads, "the rights of habitation in residential districts are ordinarily superior to the rights of trade or business therein, particularly where the business may be defined as nonessential and not dependent upon a fixed location." And even where the resident was the first user in an area, there were cases where the area later came to be dominated by inconsistent uses, such as the few remaining homes in an area originally residential that are now surrounded by industrial facilities. Do we close all the factories to satisfy a few residential users, regardless of economic impact? The rule that gave automatic preference to residential users was doomed from the outset as an unworkable approach.

Another possible approach is to say that the activity that settled in an area first should always win against subsequent inconsistent activities. While this idea has often been considered, most American courts have rejected it as a firm principle for resolving nuisance cases. To say that the person who gets there first should win means that anyone who sets up any kind of activity in an area has been granted the power to determine the character of that area for the future. Such an approach, which effectively delegates a planning function to the whim of individual decisions, may well lead to chaotic arrangement of land uses and economic inefficiency.

The solution finally adopted by most courts was to take both the firstness factor and the importance of residences into account, but then to qualify the decision on the basis of an overall assessment of the character of the area. Courts decided whether the area in question was residential, or industrial, or agricultural, or commercial, and then decided which of the existing land-uses were appropriately located and which were out of place. These judicial efforts produced in some cases a kind of careful line-drawing not unlike that engaged in to implement contemporary zoning ordinances. Thus, as nuisance law finally developed in the 20th century, you could win only by showing that you were suffering a harm caused by a neighboring activity that was out of place given the

overall character of the neighborhood. But even in such cases, in most states it remains within the discretion of the court whether you can receive an order closing down the offensive activity, or merely receive money damages to compensate you for the injury suffered, with the offensive activity permitted to continue as before.

In terms of public regulation of land use through statutes and ordinances, one very important point emerges from this history of nuisance law: those activitities that would most likely be regarded as nuisances by a court applying the above rules are the ones that can most easily be regulated out of existence by public regulations. But this is not to say that the underlying definitional problems in nuisance law have all been resolved; in fact, there are serious unanswered questions as to what kinds of harms are serious enough to be worthy of complaint, and as to what procedure should be employed for defining the character of an area. When an area is designated "residential" for purposes of nuisance law, do you mean single-family houses, or all residences, or single-family houses on large lots only? To the extent you go beyond the simply classification "residential," you are making finer distinctions than would have been made by courts in nuisance cases, and are achieving results that would have been unobtainable in nuisance cases. But I will pick this up again after a momentary digression.

When the government tells you that you cannot use your land in a particular way, the government is interfering with freedom of choice with respect to your private property. For example, if you are told by the government that your locality is short of parkland, and that therefore you cannot use your lot for anything other than a public park, you should justifiably feel outraged that you are being asked to supply a park for your neighbors and not being compensated for your loss in terms of what you planned to do with your land. On the other hand, if you maintain a smoky factory in the middle of a residential neighborhood, you should not feel outraged if the local government closes your factory, since it is likely that your neighbors could have achieved the same result by going into court and complaining that you were a nuisance. Unfortunately, most of the current cases are not so easy as either of the two examples, but the examples do serve to illustrate the basic distinction in this area. Both state and federal constitutions provide that the government cannot take your land for public use unless you receive compensation for your loss. Thus, if the government wants a new park and wishes to use privately-owned land, it should pay the private owner for the imposition

on the private owner's freedom. On the other hand, it is within the inherent power of government to pass laws to promote the health and safety of the public, and no private individual can claim the right to conduct activities that are harmful to his or her neighbors. People who are ordered to cease such activities have no legitimate claim for compensation for being told to stop what they are doing. The basic distinction is between taking, where the restriction imposed by the government will give rise to a claim for compensation, and regulation, which is a permissible activity of government giving rise to no claim for compensation. Those restrictions that fall in the category of regulation are, in the context of localized spillover effects of land-use, based on private nuisance law, which I discussed earlier. The more closely the activity subjected to regulation resembles a traditional private nuisance, the more likely it is that government can stop the activity without incurring an obligation to compensate the restricted landowner. The problem for the courts has been to differentiate the regulations from the takings.

The easiest case for categorization as a taking is the one where the government physically occupies your land for a new highway, or a school, or other public building. Clearly, in such cases the government has taken your land and must compensate you. The more difficult cases are those where you are left in possession of your land, but you have been severely restricted in your choices of land use. In a number of important cases, the United States Supreme Court, as the final arbiter of these questions of constitutional interpretation, has been required to evaluate particular restrictions to decide whether they are takings or regulations.

Four of the most important Supreme Court cases dealing with the limits of land-use regulation were decided in the period between 1883 and 1926; those cases set the basic ground rules for such regulation today. In 1883, the Court decided the case of Mugler v. Kansas, in which the owner and operator of a brewery challenged a state law that banned the manufacture and sale of intoxicating beverages. The state law declared that the places and equipment for the manufacture of such beverages were public nuisances. The owner claimed that he had entered the brewery business when it was legal to do so, that he had invested $10,000 in the brewery, and that the effect of the state law was to deprive him of nearly all of the value in his property by rendering it worthless and not compensating him. The Supreme Court rejected the brewery owner's claim, basically saying that the state could decide that alcoholic beverages were a kind of public nuisance, offensive to health and morals, and that by

analogy to traditional nuisance law, it was within the power of the state to outlaw the activity altogether by virtue of its regulatory powers. Although the particular case involved the pervasive kind of harm (in that alcoholic beverages were banned throughout the state) rather than a localized one, the basic principle was established that when the state merely wishes to terminate a nuisance, it need not compensate the offending landowner. The Court said that such a case was very different from one where unoffending property is taken away from an innocent owner.

Similar, and decided in 1915, was the case of Hadacheck v. Sebastian, which did involve a localized spillover effect of land use. The challenged ordinance in that case required the immediate termination of the operations of a brickyard that had preexisted other development in its area but was now in a residential neighborhood. The economic effect of the ordinance was to reduce the value of the bed of clay surrounding the brickyard from $800,000 to $60,000. The Supreme Court, relying on the nuisance analogy, upheld the regulation as a valid exercise of governmental power. As you may recall from our earlier discussion of nuisance law, courts in nuisance cases have rejected the claim of the first user in a particular area where the area is now dominated by another kind of land use to the point where it can be said that the first activity has become out of place and is causing harm to the now dominant activity. This approach led to the Supreme Court's approval of restriction without compensation in the Hadacheck case.

Of the four Supreme Court cases, the next two dealt with activities that would probably never be regarded as nuisances under traditional nuisance law. And it was in these cases that the Court began to set some limitations on the scope of government power to regulate land use. In 1922, the Supreme Court decided Pennsylvania Coal Co. v. Mahon, which involved a peculiar landowning practice common in much of Pennsylvania at that time. Many coal companies had purchased huge tracts of land in the 19th century to plan for future coal needs. Having no use for much of this land at the time of purchase, and not expecting to need it for some time, the coal companies sold to various purchasers rights to the surface only, retaining all rights to the underlying minerals. These purchasers proceeded to erect their homes and businesses on the land. In fact, entire cities came to be located on such land, with the coal companies continuing to own all rights to use the land beneath the surface. Finally, in the 20th century, the coal companies arrived to begin mining the land underneath all the homes and businesses, even though such mining activities

would disrupt or even destroy the property of the surface owners. Pennsylvania responded to this problem by enacting a statute providing that mining was prohibited wherever such mining would cause the subsidence of land under a structure used as a human habitation. The coal companies went to the United States Supreme Court, complaining that the law regulating their right to mine effectively destroyed their property rights in the minerals underneath the surface, and that such action could not be taken without payment of compensation.

In this case, the Supreme Court upheld the claim of the coal companies. The theory of the decision was that there are some cases where regulations that limit property rights simply go too far; in this case, the regulation effectively destroyed all value in the minerals by making mining impossible. The effect of the regulation was to transform property rights in the surface only, which was all that had been acquired originally by the surface users, into absolute property rights in the land, which they had never owned. An important point here is that the surface owners could never have succeeded in attacking the mining activity as a nuisance, because they had acquired their land with less than even the usual expectation of a landowner as far as conflicting land uses. By buying the surface only, they had implicitly agreed that their enjoyment was contingent upon the future desires of the coal companies. Another point is that the regulation, while perhaps serving the health and safety of the community as a whole, took away all value owned by the coal companies. If they could not mine their land, they could not do anything with it. In such a case, the Supreme Court said, the state could stop the mining activities, but only by paying the coal companies the value of their property. Thus, if a regulation attempts to ban an activity that would not have been subject to attack under private nuisance law, the state must either compensate the affected property owner, or make sure that the regulation does not go too far in its economic impact on the person subjected to the regulation.

The regulation principle was again tested in 1926 in the famous case of Village of Euclid v. Ambler Realty Co., which was the first Supreme Court case to deal with comprehensive municipal zoning. The zoning ordinance involved in the Euclid case was a simple one in comparison with contemporary zoning laws; it divided the village into industrial, light industrial, commercial, and residential zones. The residential category was further subdivided into separate zones for apartment houses, two-family houses, and single-family houses. The landowner challenging the zoning ordinance claimed that those portions of its land placed in

residential zones would suffer a reduction in value from $10,000 per acre to $2,500 per acre.

In terms of the nuisance law background, what zoning set out to do was to prevent nuisance situations from arising by allocating areas to particular kinds of land uses in advance, thereby minimizing the number of possible spillover conflicts. Instead of waiting for a retail store, for example, to complain about the noise or smoke from a neighboring factory, the ordinance told people where to locate their stores and factories so as to prevent such conflicts from arising. But the ordinance involved in Euclid went well beyond mere prospective regulation of nuisances in its distinction between different kinds of residential areas. No nuisance case had ever decided that an apartment house or two-family house was a nuisance to a single-family house.

The Supreme Court nevertheless accepted the nuisance analogy as a basis for upholding the zoning ordinance, saying that by analogy apartment houses did have nuisance impacts on neighboring single-family houses, and that therefore the regulation could provide for separation of those land uses. At the same time, however, the Supreme Court made it clear that zoning does go beyond nuisance law by adopting the idea from the Mahon case that the regulation is valid so long as it does not go too far in depriving the landowner of value in the property. This aspect of the decision was confirmed two years later in another Supreme Court case, Nectow v. City of Cambridge, where the Supreme Court invalidated a zoning ordinance to the extent it applied to designate as residential land that was clearly worthless for such uses, where the result could have been avoided by the municipality if it had drawn its zoning map to follow the adjacent streets, instead of cutting across the corner owned by the complainant, which corner was a small part of large neighboring industrial area.

To the extent that zoning laws outlaw activities that would never have been regarded as nuisances, then, the landowner affected must be left with some value in the property, not necessarily the most lucrative use possible, but some reasonable possibility of use. In addition, zoning laws have not been as quick to stamp out the rights of the first user in a given area as courts were in nuisance cases. Most zoning laws provide protection for what are called prior nonconforming uses, that is, established land uses accompanied by previously erected structures that would be in violation of a subsequently enacted zoning law. The conferral of nonconforming use status on these activities is a compromise that seeks to avoid catastrophic land value impacts. A familiar example is the lone

grocery store in the middle of a residential neighborhood. Thus zoning stops short of the degree of restriction, in terms of market value loss, that could be imposed by a court in a nuisance case.

On the other hand, the Euclid case gave local governments a tremendous amount of power to regulate. A primary basis for this expansion of power was the Euclid case's approval of the concept of regulating density of population, which it did by upholding the distinction between single-family residences and apartment houses. It is this principle of density regulation that permits distinctions to be made not only between multi-family and single-family houses, but also between two-family houses and single-family houses, and between single-family houses on 1/2 acre lots, and single-family houses on 1 acre lots, and single-family houses on 5-acre lots. Many modern zoning ordinances provide for a hierarchy of residential zones with a minimum lot size provided for each. In effect, such laws are saying that a house on a 1-acre lot is in some sense a nuisance to a house on a 3-acre lot. This kind of distinction suggests how far beyond traditional nuisance law modern land-use regulation has gone.

Recent cases have further extended the analogy to nuisance law and in so doing have further increased the scope of governmental power to regulate land use. One assumption underlying the cases that I have discussed so far is that whenever regulation goes beyond the termination of an activity that would be regarded as a traditional nuisance, the landowner is entitled to be regulated up to the point where the land retains some reasonable value, but no further. This assumption has now been called into question, at least in Wisconsin, by a very significant case decided in 1972 by the Wisconsin Supreme Court, Just v. Marinette County. The case involved a county program for regulating use of shorelands. Under the statutory scheme, the owner of land designated as "wetland" under the statute cannot fill in the land without first obtaining a permit from the local government. Owners of land who went ahead and commenced fill-in operations without even having sought such a permit were charged with a violation of the statute. The Supreme Court of Wisconsin in upholding the statute announced a new view of landowner expectations, saying that one does not necessarily have the expectation of exploiting one's land for its economic value, where the expectation includes the necessity of changing the land from its natural state. The effect of this doctrine, if it is adopted elsewhere, may be to limit severely the traditional expectations of landowners and would-be developers of land. The early nuisance cases started from the premise of free exploitation of land, subject to regulation

if you caused substantial harm to your neighbors. We may be shifting to a scheme where your decision to develop or make use of your land is not a given, but something that must be justified as wise and not likely to produce adverse impact before you can obtain permission to go ahead.

Government programs like that upheld in the Just case are a product of increasing awareness of the subtle and often disastrous impacts of human activities, especially land development, on the surrounding human and natural environment. In one sense, this increasing awareness may be viewed as a more sophisticated kind of nuisance law; with greater scientific knowledge our concept of harm changes. Along with greater scientific knowledge has come an increasing awareness of the risks that may follow any change in the natural environment, risks not only to plant and animal life, but risks to people as well. That there is such a changing perception of the relationship between people and their environment is clearly evident in court cases involving land-use regulation.

Another significant recent case is a particularly striking example of this changing attitude. The case expanded local land use regulatory power largely on the basis of feared but presently unknown dangers to the environment. The case, Steel Hill Development, Inc. v. Town of Sanbornton, involved a small rural town in New Hampshire, a town with a year-round population of 1,000 that increases to 2,000 in the summer because of its attractiveness as a summer resort. A developer had purchased a large amount of land in the town with a view toward constructing summer homes for about 500 families. At the time of purchase, the land was zoned for minimum lot sizes of 3/4 acre. As a result of a public outcry against the developer's plan, the town responded by rezoning the entire tract, placing 70 percent of it in a new "Forest Conservation Zone," with a six-acre minimum lot size requirement, and the remainder in an Agricultural zone, with a 3-acre minimum lot size requirement. The environmental fears of the townsfolk included water pollution, interference with smelt spawning, increased traffic, and air pollution, and a general fear of destruction of the rural character of the town. There was little or no data offered to back up these fears, but the court nevertheless upheld the ordinance, concluding that there was enough basis for concern to justify an interim program of restrictions (the ordinance had been in effect nearly two years at the time the case was decided) to enable the town to explore the anticipated environmental problems. Here again we find a significant shift away from the requirements of nuisance law. Rather than regulating to prevent demonstrable harms, the town is regulating

to give itself a chance to assess the possibility of harm. Again the landowner's expectation is reduced from the right to proceed unless harm will occur, to a right to proceed only if it is clear that harm will not occur.

Harmful impact to justify land-use regulation need not even be limited to the natural environment. A very important case decided by the United States Supreme Court last year (Boraas v. Village of Belle Terre), in fact the first zoning case decided by the court in 45 years, upheld the right of a small residential town to use extreme measures to preserve its established character and way of life. The town is one that is zoned exclusively for single-family residential use on minimum acreage lots. The zoning ordinance went on to define "family" for purposes of the ordinance as any size group of persons related by blood, marriage, or adoption, and a group of no more than two unrelated persons. The ordinance was applied to prevent a single person owning a large house from renting out the house to a group of six graduate students from a nearby university. Despite a claim on the part of the students and the affected landowner that the ordinance infringed on their basic right of privacy and freedom of association, in terms of choice of lifestyle, the Supreme Court upheld the ordinance as a valid means for regulating density in the community. In very strong terms, the Court recognized the right of the town to preserve its quiet residential way of life, in effect, to seal itself off from outside population or economic pressures.

A related recent development permits municipalities to limit land-use for economic reasons. A very significant New York case decided in 1972 upheld a plan for what was called "phased development," which is essentially an extension of the basic zoning idea from allocation of land uses over territorial space to allocation of land use over time, in that case, over an 18-year period. Under the scheme, the town announced its capital improvement plans for the next 18 years, with respect to services such as sanitary sewers, drainage facilities, public parks or recreation facilities, roads, and firehouses, and implemented a regulation that withheld from any developer permission to develop land until the land had been provided with a sufficient level of these services, even if that meant waiting anywhere up to 18 years for the privilege. The only alternative under the scheme is to assume personally the cost of providing the requisite level of services, rather than waiting to have them provided through general taxation, a cost that would in most cases be prohibitive under the plan. Here too traditional expectations are being altered. A

town can regulate the amount of development by regulating the level of services it is willing to provide, and the amounts it is willing to tax itself for providing them. While the scheme does not take away all value from those not permitted to develop now, it certainly would seem to reduce land values by compelling a waiting period prior to authorization for development. The justifications are efficiency, prevention of tax burdens, prevention of sprawl, and recognition of financial reality, but the increase in regulatory power is significant.

The cases discussed here have involved the most significant increases in regulatory power. There have been other cases that have struck down zoning ordinances as going too far, and have taken other interests into account. In a number of states, large minimum lot size requirements have been invalidated, but those cases did not involve significant environmental arguments of the sort raised in Sanbornton, and were decided prior to the Belle Terre case. The most extreme land-use regulation to reach a court in recent times was struck down, one that explicitly attempted to limit the population of a town by setting a ceiling on the number of building permits available annually. The case is presently on appeal. And the techniques discussed above provide ways of coming very close to limiting population growth without doing so explicitly.

These comments are not necessarily to the point of finding anything wrong with these increases in regulatory power, but an attempt to show how current developments relate to and grow out of the historical legal background. Increasing regulations mean increasing and possibly awesome burdens to be imposed on those who are subjected to regulation. If we are to protect our environment and maximize the value of our resources, we must do so in a way that insures an equitable sharing of our limited resources.

Cited cases:

Mugler v. Kansas, 123 U.S. 623 (1887)
Hadachek v. Sebastian, 239 U.S. 394 (1915)
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
Nectow v. City of Cambridge, 277 U.S. 183 (1928)
Just v. Marinette County, 201 N.W.2d 761 (W.S. 1972)
Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972)
Boraas v. Village of Belle Terre, 94 S.Ct. 1536 (1974).

Appendix I

POWERS OF THE STATE OF MINNESOTA

The State of Minnesota has no comprehensive plan for the development of its land. There does exist, however, a large number of laws which grant state executive agencies authority to perform many acts dealing with aspects of the land use question. A recent (1973) survey[1] of selected chapters of Minnesota Statutes for existing land use control powers - powers to finance, enforce, maintain, and reserve, in addition to the customary powers to acquire, regulate, develop and dispose of land and its related uses - turned up nearly 800 separate such powers. Nearly 600 of these powers were found in three state agencies - Department of Natural Resources, Department of Highways, and the Pollution Control Agency.

Beyond the assignment of these duties to state agencies, the legislature has passed zoning measures directed toward certain specific activities or entities. Municipalities, for example, have comprehensive planning authority and the power to control land use in Minnesota Statutes §§ 462.351-462.364 (1974). In recent years, a number of Acts have been passed which have enlarged the state's role in regulating private land use in unincorporated areas of Minnesota. Five of these Acts are described below:

FLOOD PLAIN MANAGEMENT ACT (1969, amended 1973)
Citation: Minnesota Statutes §§104.01-104.07 (1974)
Authority Granted To: Department of Natural Resources and local unit of government

The goal of this Act is the minimization of flood damage through flood plain management. A "flood plain" is an "area adjoining a watercourse which has been or...may be covered" by a flood which is "representative of large floods known to have occured generally in Minnesota and reasonably characteristic of what can be expected to occur on an average frequency in the magnitude of the 100 year recurrence interval."

The Act requires local governmental units to adopt and enforce flood plain management ordinances. Among other things, these ordinances

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[1] See Wayne Gilbert and Douglas Gregor in Appendix III.

are to delineate flood plains, preserve the capacity of the flood plain to carry and discharge floods, minimize flood damage, and regulate land use in flood plains. Before adoption, ordinances must be submitted to the Commissioner of Natural Resources for review and approval. The Commissioner has power to adopt an ordinance in the event that the responsible local governing unit fails to act. The Commissioner also must promulgate criteria for determining acceptable flood plain land uses and other flood plain management measures.

REGULATION OF SHORELAND DEVELOPMENT (1969, amended 1973)
Citation: Minnesota Statutes §105.485 (1974)
Authority Granted To: Department of Natural Resources and local units of government

This is an Act to "provide guidance for the wise development of shoreland." "Shoreland" is (1) land within 1,000 feet from the normal high watermark of a lake, pond, or flowage; and (2) land within 300 feet of a river or stream (or the landward side of a flood plain delineated by ordinance).

Under the Act, the Commissioner of Natural Resources has the responsibility of promulgating statewide standards and criteria for the subdivision, use, and development of Minnesota's shorelands. It then becomes the responsibility of the counties (for shoreland in unincorporated areas) and municipalities (for shoreland within city limits) to adopt and enforce rules and regulations. The Commissioner has the power to impose rules and regulations if the county or municipality either fails to act or adopts an ordinance which fails to meet minimum standards.

Among the many things regulated by this Act are the following: lot size (area) and length of water frontage suitable for a building site; placement of structures in relation to shorelines and roads; placement and construction of sanitary and waste disposal facilities; and preservation of natural shorelands through restrictions on land uses.

CRITICAL AREAS ACT (1974)
Citation: Minnesota Statutes §§ 116G.01-116G.14 (1974)
Authority Granted To: Minnesota Environmental Quality Council and local units of government

This Act declares that certain areas of the state possess "important historic, cultural, or esthetic values, or natural systems which perform functions of greater than local significance," and provides that plans and regulations shall be promulgated for the use and development of such areas.

Responsibility for drafting criteria for the selection of critical areas was given to the EQC. Critical areas are designated by the Governor based upon recommendations of the EQC. The Governor's order designating a critical area is effective for no more than three years pending approval by the legislature or the appropriate regional development commission.

Once an area is designated by the order of the Governor, it becomes the responsibility of local units of government to prepare plans and regulations for the designated area. The plans and regulations of the local governing unit are subject to the review and approval of the EQC. The EQC has power to prepare and adopt plans for a designated critical area, in the event that the local unit of government fails to do so; and the authority to bring lawsuits to compel enforcement of plans and regulations once established.

Development in critical areas is regulated by a system of permits which may be obtained from the local governing unit. Development must be consistent with the approved plans and regulations, and includes "the making of any material change in the use or appearance of any structure or land."

MINNESOTA WILD AND SCENIC RIVERS ACT (1973)
Citation: Minnesota Statutes §§ 104.31-104.40 (1974)
Authority Granted To: Department of Natural Resources and local units of government

The policy goal declared by this Act is the preservation and protection of certain of Minnesota's rivers and their adjacent lands which possess "outstanding scenic, recreational, natural, historical, scientific and similar values." "River" is defined to include lakes through which a river or stream flows.

The Commissioner of Natural Resources is charged with responsibility for developing and promulgating criteria for the classification and designation of rivers; for designating the rivers to be included in the system; and for promulgating regulations for, and otherwise managing, the components of the system. Local units of government are required to adapt or amend their ordinances to the extent necessary to comply with the Commissioner's standards and criteria and the management plan.

The Act specifically grants authority to the Commissioner for the purchase of scenic easements.

MINNESOTA POWER PLANT SITING ACT (1973)
Citation: Minnesota Statutes §§ 116C.51-116C.69 (1974)
Authority Granted To: Environmental Quality Council

In 1973, the EQC was granted authority to provide for power plant sites and transmission line corridor and route selection. The legislation declares twin policy goals which are to be balanced: (1) minimizing adverse human and environmental impact, and (2) insuring electric power system reliability and insuring that electric energy needs are met and fulfilled.

The authority embraces power plants which have a capacity of 50,000 kw or more, and transmission lines which have a capacity of 200 kv or more. Among other duties, the EQC is required to adopt siting criteria and assemble an inventory of potential sites. Utilities are required to apply for permits and to regularly submit an advance forecast of their projected demand and construction plans.

COASTAL ZONE PLANNING PROGRAM

In 1972, Congress passed the Coastal Zone Management Act which provides funds for states to prepare management plans for their coastal lands and waters. The North Shore of Lake Superior, defined for this purpose as the entire Lake Superior watershed, is included within the scope of this Act.

Minnesota's Coastal Zone Planning Program is a three-year (1974-77) comprehensive study of the North Shore aimed at developing a plan to guide future development. The study is being coordinated by the State Planning Agency, and the work group includes representatives of the involved Counties, the Arrowhead Regional Development Commission, the Pollution Control Agency and the Departments of Health, Natural Resources, Highways, and Economic Development.

Appendix II

GLOSSARY

CONDITIONAL USE:	A use which may be permitted in a district through the granting by the board of appeals of a special exception upon a finding by the board that it meets specified conditions.
EMMINENT DOMAIN:	The power of a governmental unit, within the territorial limits of its jurisdiction, to take property for public use. The power may be conferred on non-sovereign entities by legislative declaration. Compensation must be paid.
LAND:	Land, roads, water, watercourses, private ways and buildups, structures, and machinery or equipment when attached to the realty.
NONCONFORMING USE:	Any building or land lawfully occupied by a use at the effective date of (an) ordinance or amendment thereto which does not conform after the passage of (the) ordinance or amendment.
SCENIC EASEMENTS:	"Scenic easement" means an interest in land, less than the fee title, which limits the use of such land for the purpose of protecting the scenic, recreational, or natural characteristics of a wild, scenic or recreational river area. Unless otherwise expressly and specifically provided by the parties, such easement shall be (a) perpetually held for the benefit of the people of Minnesota; (b) specifically enforceable by its holder or any beneficiary; and (c) binding upon the holder of the servient estate, his heirs, successors and assigns. Unless specifically provided by the parties, no such easement shall give the holder or any beneficiary the right to enter on the land except for enforcement of the easement. Minnesota Statutes (1974) 104.37
SETBACK:	The distance between a street line or shoreline and the building line.

TAKING: Taking and all words and phrases of like import include every interference, under the right of eminent domain, with the possession, enjoyment or value of private property. Minnesota Statutes (1974) § 117.025

USE: (a) any purpose for which a building or other structure or a tract of land may be designed, arranged, intended, maintained, or occupies, or (b) any activity, occupation, business, or operation carried on, or intended to be carried on, in a building or other structure or on a tract of land.

VARIANCE: A variance authorizes deviations from a literal application of the terms of an ordinance "in instances where their strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration" and will be granted only where the deviation it allows is "in keeping with the spirit and intent of the ordinance."

Appendix III

SOME SOURCES OF INFORMATION

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John Borchert and Donald Yaeger, Atlas of Minnesota Resources and Development (Minnesota State Planning Agency, Rev. 1969).

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Wayne Gilbert and Douglas Gregor, Minnesota Land Use Laws A Classification of State Powers, Minnesota Land Management Information System Study, Report #5 (Center for Urban and Regional Affairs, University of Minnesota, 1973).

Gunnar Isberg, Local and Regional Planning in Minnesota (League of Minnesota Municipalities and the Metropolitan Council, 1975).

Minnesota State Planning Agency, Programs, Policies and Legal Authorities Affecting the Use of Land in Minnesota, Land Use Planning Report Number 1 (St. Paul, May 1975).

Minnesota State Planning Agency, Opinions on Land Use Planning: A Survey of County Zoning Administrators, Land Use Planning Report Number 2 (St. Paul, June 1975).

Where to write for reports or other information:

All-University Council on Environmental Quality
967 Social Science Building
University of Minnesota
Minneapolis, Minnesota 55455

Center for Urban and Regional Affairs
311 Walter Library
University of Minnesota
Minneapolis, Minnesota 55455

League of Minnesota Municipalities
300 Hanover Building
480 Cedar Street
St. Paul, Minnesota 55101

Minnesota State Planning Agency
101 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101